(3)

No. 03-1299

Supreme Court, U.S.
FILED
APR 2 9 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

UNUM LIFE INSURANCE COMPANY OF AMERICA AND UNUMPROVIDENT CORPORATION,

Petitioners,

v.

JANCYE H. TIERNEY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eighth District Of Texas

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONERS

DOUG K. BUTLER
FIGARI, DAVENPORT & GRAVES, L.L.P.
3400 Bank of America Plaza
901 Main St., LB 125
Dallas, TX 75202-3796
(214) 939-2000

MARK E. SCHMIDTKE*
**Counsel of Record*
SCHMIDTKE HOEPPNER CONSULTANTS LLP
103 East Lincolnway
Valparaiso, IN 46384
(219) 465-7368

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONERS 1

I. THIS COURT HAS JURISDICTION TO GRANT THE PETITION 2

II. RECENT CIRCUIT COURT DECISIONS CONFIRM THAT THERE IS A SPLIT OF AUTHORITY IN THE LOWER COURTS 7

III. THE FIFTH CIRCUIT DECISION IN *SHARPLESS* CONFIRMS THE IMPACT OF THIS COURT'S DECISION IN *YATES* ON THE ISSUE PRESENTED IN THE PETITION 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Bess v. New York Life Ins. co., 87 Fed. Appx. 661, 2004 U.S. App. Lexis 2233 (9th Cir. February 10, 2004) 1, 8

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2, 3, 4, 5

First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 4, 5

Johnson v. Muelberger, 340 U.S. 581 (1951) 3

Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262 (9th Cir. 1991) 1, 8

Lawrence v. Chater, 516 U.S. 163 (1996) 6

Miami Herald Publ'g, Co. v. Tornillo, 418 U.S. 241 (1974) 3

North Dakota State Board v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 3

Pennsylvania v. Richie, 480 U.S. 39 (1987) 4

Provident Life & Acc. Ins. Co. v. Sharpless, ___ F.3d ___, 2004 U.S. App. Lexis 6937 (5th Cir.2004) 1, 6, 8

Yates v. Hendon, 124 S.Ct. 1330, 158 L.Ed.2d 40, 72 U.S.L.W. 4219 (2004) ..... *passim*

STATUTES

28 U.S.C. §1257 ..... 4, 6

28 U.S.C. §2106 6

RULE

Tex. R. App. P. 56.1(b)(1) 2

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONERS

This Court has jurisdiction to grant the petition based on the pragmatic approach that the Court has consistently applied to determine finality. The Texas Court of Appeals held that a benefit plan that covers joint shareholders is not governed by ERISA as a matter of law. On remand, the respondent has argued to the trial court that the court of appeals' decision is binding and constitutes law of the case. It is unclear how the respondent can argue in this Court that the issue can be reconsidered by the state courts and, at the same time, argue in the state court that the issue cannot be reconsidered. In any event, under respondent's theory, petitioner will have no opportunity for reconsideration of the federal issue except in this Court. Under the pragmatic approach, the federal issue presented in the petition is final and ripe for consideration.

Two new appellate court decisions issued since the petition was filed provide additional support for granting certiorari. On April 7, 2004, the Ninth Circuit denied rehearing in *Bess v. New York Life Ins. Co.*, 87 Fed. Appx. 661, 2004 U.S. App. Lexis 2233 (9th Cir. February 10, 2004), effectively refusing to revisit its previous decision in *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262 (9th Cir. 1991), which held that joint shareholders are not employees under ERISA. *Bess* reaffirms the lower court split on the issue presented in the petition. On April 9, 2004, in a decision that relied heavily on *Yates v. Hendon*, 124 S.Ct. 1330, 158 L.Ed.2d 40, 72 U.S.L.W. 4219 (2004), the Fifth Circuit held that a joint shareholder is an employee under ERISA and that a disability plan covering joint shareholders is governed by ERISA. *Provident Life & Acc. Ins. Co. v. Sharpless*, ___ F.3d ___, 2004 U.S. App. Lexis 6937 (5th Cir. 2004). The Fifth Circuit decision confirms that *Yates* has a direct impact on the issue in the petition

and supports petitioners' request that this Court summarily reverse the Texas Court of Appeals and remand the matter for reconsideration in light of *Yates*.[1]

I. THIS COURT HAS JURISDICTION TO GRANT THE PETITION.

The Texas Court of Appeals held that benefit plans covering only joint working owners *cannot* be governed by ERISA as a matter of law. On that basis, the court overturned a summary judgment in favor of the petitioners under ERISA and remanded for a determination of whether the disability policy contained one plan or two and, ultimately, for a trial on the merits (under ERISA or state law, depending on the outcome of the first inquiry). Respondent is contending in the trial court that reconsideration of the federal issue is barred by the law of the case doctrine. As things stand at present, petitioners' only practical opportunity to have the federal issue reconsidered is through a petition for writ of certiorari.[2]

Contrary to respondent's argument, this Court has *never* applied a "literal" or "plain" reading of the finality requirement, but has instead applied a pragmatic approach. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478

---

[1] Respondent's waiver argument is meritless given the Texas Court of Appeals' explicit ruling on the merits of the issue. It is because of the appellate court's ruling on the federal issue that respondent has since argued in the trial court that the decision is law of the case and cannot be revisited, even in light of *Yates*.

[2] The Texas Supreme Court's denial of the petition for review indicated that it was not satisfied that the appellate court correctly declared the law, but that the error did not require reversal or that it was not important enough to the state's jurisprudence to require correction. Tex. R. App. P. 56.1(b)(1). Indeed, respondent argued that the Texas Supreme Court need not address the federal law issue because petitioners could ask this Court to address it. It is disingenuous for her to now argue that this Court should not address the issue.

n.7 (1975) (the finality requirement is not administered in "such a mechanical fashion" and "is frequently so close a question that decision of that issue either way can be supported with equally forceful argument, . . . that it is impossible to devise a formula to resolve all marginal cases coming within what might be called the 'twilight zone' of finality.") The pragmatic approach reveals that it is simply not *realistic* to argue that a state court decision is not final merely because the trial court *may* revisit an issue that was expressly decided by a superior court. *North Dakota State Board v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973) (the only way for lower court to revisit issue was to "defy its own" superior court); *Johnson v. Muelberger*, 340 U.S. 581, 583 (1951) (upon remand to lower court "for further proceedings not inconsistent with" the higher court, the issue decided by the higher court was no longer open).

To accept respondent's unreasonable speculation as a basis to deny the petition would require the parties to "go through the motions" of a trial and successive appeals to bring the issue of the status of joint working owners under ERISA back before this Court, when *Yates* demonstrates that the reasoning of the Court of Appeals is incorrect. Such an exercise leaves the Texas state courts "operating in the shadow of" a decision, the correctness of which is already placed in "serious doubt" after *Yates*. *Cohn*, 420 U.S. at 486, 508. Given these circumstances, it would be intolerable to leave unaddressed the Court of Appeals' interpretation of the status of joint working owners under ERISA. *See Miami Herald Publ'g, Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974).

Viewing this case through the lens of pragmatic reasoning, there are several bases supporting this Court's jurisdiction. First, jurisdiction is supported because, absent review of the federal issue now, "later review cannot be had." *Cohn*, 420 U.S. at 481. If petitioners win on the merits, the federal issue will be moot. If petitioners do not prevail, respondent is already taking the position in

the trial court that the law of the case doctrine prohibits petitioner from raising the federal issue again. Contrary to her position in this Court that the law of the case doctrine is not absolute, respondent is arguing before the trial court that: "[T]he Court of Appeals' holding . . . is binding on this Court under the law of the case doctrine" and that "[T]he Court of Appeals' opinion mandates the conclusion that, as a matter of law, ERISA preemption does not apply. . . . " [Plaintiff's Motion for Partial Summary Judgment, pp. 9, 11.] If respondent's position in the state court prevails, petitioners will be required to raise the same federal issue before three levels of the state judiciary before they can once again petition this Court. Petitioners are not required to undergo such "fruitless" action before jurisdiction will lie under §1257. *See Pennsylvania v. Richie*, 480 U.S. 39, 48 n.7 (1987).

Second, to the extent the federal issue does not become moot, jurisdiction is also supported by *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). In *First Evangelical*, the California Court of Appeals held that the Just Compensation Clause does not require compensation for "temporary" regulatory takings. 482 U.S. at 310. Because the state court decision neither rejected the allegations of a taking as false, nor held that a regulatory measure could never constitute a taking, the remedial question was "isolated" and therefore final for purposes of §1257. *Id.* at 311-12. As a result, the Court held that "this distinct issue of federal law will survive and require decision no matter how further proceedings resolve the [remaining issue of liability in the case]". Notably, the Court reached this decision despite the fact that the Court's review would not consider whether the state ordinance "actually denied appellant all use of its property," or whether the ordinance was a valid exercise of state authority and that these questions would "remain open" on remand. *Id.* at 313.

Under *First Evangelical*, respondent's argument that a finding in her favor in the state courts could be based on

alternative grounds is irrelevant given that the Texas Court of Appeals' decision has similarly isolated the "joint working owner" question for this Court's consideration. As in *First Evangelical*, the Court of Appeals did not decide that the disability policy was not governed by ERISA or that the policy could never be governed by ERISA. Instead, the Court of Appeals decided the discrete legal issue of whether a plan covering only joint working owners could be governed by ERISA, which issue is ripe for review by this Court.

Jurisdiction is also supported because the federal issue controls the applicable cause of action. *Cohn,* 420 U.S. at 484. The trial court determined that (1) the disability plan was governed by ERISA, (2) respondent's state law causes of action were preempted by ERISA, and (3) petitioner's denial of benefits was not arbitrary and capricious under ERISA. If the Court of Appeals' decision is reversed on the issue presented, the trial court would again find in petitioner's favor on the issue of ERISA preemption because the trial court has already determined that, based on the record, the disability policy met the statutory requirements of an ERISA plan as a matter of law, including the safe harbor issue that respondent contends is still open. Petition, App. 5 (the trial court ruled in favor of Unum on all issues related to whether there was an ERISA plan, including the safe harbor issue). A determination that ERISA does or does not apply controls the applicable cause of action. As a practical matter, reversal of the court of appeals would dictate that respondent's claim is governed by ERISA and not by state law, whereas a denial of review could result in respondent pursuing a state law cause of action.

This Court's refusal to consider immediately the state court decision would also result in the frustration of federal policy, as embodied in ERISA, which this Court so recently noted in *Yates*:

> Congress' aim is advanced by our reading of the text. . . . Treating working owners as participants

> not only furthers ERISA's purpose to promote and facilitate employee benefit plans. Recognizing the working owner as an ERISA-sheltered plan participant also avoids the anomaly that the same plan will be controlled by discrete regimes: federal-law governance for the nonowner employees; state-law governance for the working owner.

124 S.Ct. at 1330.

In summary, the *Cohn* factors, and the question of finality, come down to a question of judicial economy and whether petitioners will have an opportunity to again raise the federal issue. If the petitioners win the case on the merits, whether under federal or state law, the federal issue will never again be ripe for review in this case. In that situation, the published state appellate court case will remain unaltered on the books even though it is a wrong interpretation of the law. On the other hand, if petitioners lose, they will be forced to litigate the entire case to conclusion and in the meantime raise the federal issue in the state trial court, the intermediate state appellate court, and the state supreme court solely for the purpose of preserving the issue for a second attempt at review in this Court. This Court's pragmatic approach to finality makes it clear that such a waste of resources is not the intent of §1257.[3]

---

[3] Alternatively, to the extent it provides a separate basis for jurisdiction, this Court has jurisdiction under 28 U.S.C. §2106 to grant certiorari, vacate the Court of Appeals' decision, and remand to the Court of Appeals for further consideration in light of *Yates*, otherwise known to this Court as the GVR order. *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996) ("We fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final.") "[T]he GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. [This Court] has GVR'd in light of a wide range of developments, including [its] own decisions. . . ." *Chater*, 516 U.S. at 166. A

(Continued on following page)

II. RECENT CIRCUIT COURT DECISIONS CONFIRM THAT THERE IS A SPLIT OF AUTHORITY IN THE LOWER COURTS.

The recent Fifth and Ninth Circuit decisions confirm that the split in the lower courts will continue for the foreseeable future absent intervention by this Court. As things stand presently, the Third, Fifth, Sixth, and Tenth Circuits hold that working joint shareholders are considered employees under ERISA and that a benefit plan covering the joint working owners is governed by ERISA. The Ninth Circuit, Massachusetts Supreme Judicial Court, and the Court of Appeals of Texas hold that joint working owners are not employees under ERISA and that a benefit plan covering working joint owners is not governed by ERISA.

In *Sharpless*, *supra*, a medical corporation provided group disability insurance to all employees of the corporation and individual disability policies issued by Provident only to the shareholder/employees, including Sharpless. *Id.* at *2. In a rescission suit involving her Provident policy, Sharpless argued that the Provident policy was not part of an ERISA plan because the Provident policies were only issued to shareholder/employees. *Id.* at *6. Relying heavily on *Yates* and on Department of Labor regulatory

---

GVR will be ordered to improve the "fairness and accuracy of judicial outcomes" in cases that do not merit the Court's plenary review. *Id.* at 168. As discussed *supra*, after the Court of Appeals' decision was entered, this Court decided *Yates* and the Fifth Circuit decided *Sharpless*, relying explicitly on *Yates*. Both *Yates* and *Sharpless* reject the very reasoning relied on by the Court of Appeals in holding that plans covering only joint working owners are not governed by ERISA. Therefore, the Court of Appeals may reject its prior reasoning if given the opportunity for further consideration. For this reason, this Court should invoke its jurisdiction under §2106 to grant review of Unum's petition, reverse the decision of the Court of Appeals, and remand the case to the Court of Appeals for further consideration in light of *Yates*.

and advisory authority, the Fifth Circuit held that because the corporate employer was owned by multiple shareholders and was not wholly owned by an individual and his/her spouse, the working owners were considered employee/participants under ERISA and the Provident coverage issued to the working joint shareholders was governed by ERISA. *Id.* at *9.

In contrast, the Ninth Circuit denied a petition for rehearing in *Bess, supra,* in which the Court held that benefit coverage issued to a fifty percent owner of a corporate employer was not governed by ERISA. The Ninth Circuit expressly relied on the holding in *Kennedy, supra,* in which the Court held that where joint shareholders are the only participants in a corporation-sponsored pension plan, the joint shareholders are not considered employees and the pension plan is not governed by ERISA.

The decisions in *Sharpless* and *Bess* emphasize two key points supporting a writ of certiorari. First, the issue presented in the petition is a timely one. In the past three years alone, the issue has been the subject of decisions in five federal circuit courts, one state supreme court, and one state court of appeals. Second, the issue has fractured the lower courts, creating a hurdle to the national uniformity in benefit plan regulation that Congress intended to accomplish through ERISA. By denying rehearing in *Bess,* the Ninth Circuit has essentially refused to reconsider its holding in *Kennedy* in light of this Court's decision in *Yates.* The Ninth Circuit's action demonstrates that the split in the lower courts will continue for the indefinite future.

III. THE FIFTH CIRCUIT DECISION IN *SHARPLESS* CONFIRMS THE IMPACT OF THIS COURT'S DECISION IN *YATES* ON THE ISSUE PRESENTED IN THE PETITION.

For purposes of the petition, the most important aspect of *Sharpless* is the Fifth Circuit's reliance on the

holding and reasoning of *Yates* and on Department of Labor regulatory and advisory authority. Citing *Yates,* the Fifth Circuit held that Congress intended working owners to qualify as plan participants and that ERISA permits working owners to have dual status as employers and as employees under the statute. 2004 U.S. App. Lexis 6937, *6 and *9. The Fifth Circuit then followed the analysis used in *Yates* by looking to the Labor Department regulatory and advisory authority and reached the following holding:

> The advisory opinions, in accord with *Yates*, lead to the conclusion that shareholders in a multiple-shareholder corporation, such as Sharpless, are employees under ERISA. The Provident Plan was further covered by ERISA as an employer-sponsored plan in which at least one employee participated, and the district court did not err in holding that ERISA governed Sharpless's Policy.

Id. at *9.

The Fifth Circuit's reliance on *Yates* directly rebuts respondent's argument that *Yates* has nothing to do with this case. Indeed, the principles established in *Yates* that Congress intended working owners to qualify as employee/participants of benefit plans and that working owners may maintain dual status as employees and employers under ERISA are directly applicable to the question of the employee status of joint shareholders who are working owners of a corporate plan sponsor. Sharpless also makes clear that the Texas Court of Appeals erred in its reading of prior Fifth Circuit decisions on which it expressly relied in deciding this very issue.[4]

---

[4] Absent reconsideration by the Texas Court of Appeals, there will also be a split between the state and federal courts in the Fifth Circuit on the federal issue.

Procedurally, this case is likely headed for trial on the issue of whether the policy covering the respondent also covered non-owner employees, whether petitioners properly denied respondent's claim for further disability benefits, and, if the case is tried under state law, whether petitioners' decision was in bad faith. This process will be lengthy and expensive. Unfortunately, if the Texas Court of Appeals could have had the benefit of this Court's analysis in *Yates* and had ruled correctly, the first issue would be irrelevant, the second issue would be decided on summary judgment based on the written record, and the bad faith claim would be dismissed. At this juncture, before the parties are required to incur substantial additional time and expense, the Texas Court of Appeals should be required to reconsider the issue presented in the petition in light *Yates v. Hendon*.

CONCLUSION

For the foregoing reasons and for the reasons previously stated, Petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

MARK E. SCHMIDTKE*
*Counsel of Record
SCHMIDTKE HOEPPNER
CONSULTANTS LLP
103 East Lincolnway
Valparaiso, IN 46384
(219) 465-7368

DOUG K. BUTLER
FIGARI, DAVENPORT &
GRAVES, L.L.P.
3400 Bank of America Plaza
901 Main St., LB 125
Dallas, TX 75202-3796
(214) 939-2000

April 29, 2004